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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RODERICK REAUX NORMAN, Defendant and Appellant.	E070204 (Super.Ct.No. BAF1700346) OPINION

APPEAL from the Superior Court of Riverside County. Jeffrey Prevost, Judge. Affirmed in part, remanded with directions in part.

Richard Schwartzberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina, Quisteen S. Shum, and Christine Levingston Bergman, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

A jury found defendant and appellant Roderick Reaux Norman guilty of making a criminal threat (Pen. Code, § 422).[1] The jury also found true that in the commission of the crime, defendant personally used a dangerous or deadly weapon, to wit, a knife (§ 12022, subd. (b)(1)).[2] In a bifurcated proceeding, defendant admitted that he had suffered a prior serious felony conviction (§ 667, subd. (a)) and a prior strike conviction (§§ 667, subds. (c) & (e)(1), 1170.12, subd. (c)(1)). Defendant was sentenced to a total term of 12 years in state prison with 717 days of credit for time served as follows: the upper term of six years on the substantive charge, plus five years for the prior serious felony conviction, plus one year for the personal use of a knife enhancement.

On appeal, defendant argues the prosecutor committed prejudicial misconduct when she twice sought testimony from the investigating detective vouching for the credibility of the victim. By way of supplemental briefing, defendant also asserts the matter should be remanded for resentencing pursuant to Senate Bill No. 1393 (2017-2018 Reg. Sess.), which amends sections 667, subdivision (a)(1), and 1385, subdivision (b), effective January 1, 2019, to give trial courts discretion to dismiss or strike a prior serious felony conviction for sentencing purposes. As we explain, we agree the matter should be

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[1] All future statutory references are to the Penal Code unless otherwise stated.

[2] The jury was deadlocked as to the charge of assault with a deadly weapon (§245, subd. (a)). Subsequently, the trial court granted the People's motion to dismiss that charge.

remanded with directions for resentencing based on Senate Bill No. 1393. In all other respects, we affirm the judgment, finding defendant's prosecutorial misconduct error to be harmless.

II

FACTUAL BACKGROUND

On March 26, 2017, at around 7:00 a.m., G.P. walked to a nearby apartment complex to collect recyclables from the dumpsters. As G.P. was walking, she saw defendant following her from the other side of the road. G.P. did not know defendant. He was a stranger to her. When G.P. got to the dumpsters, a semi-enclosed area, defendant approached and asked her name. G.P. lied and told him her name was "Tiffany."

Defendant asked her if she needed money, and he offered to pay her for sex. G.P. refused and told defendant that she was married and had nine children. G.P. then heard a "click," and felt a knife at her throat. Defendant stood behind G.P. and held the knife to her throat. Defendant asked G.P., who had a shaved head, if she was a female. He then told her to prove it. Defendant threatened G.P. that if she did not prove that she was female, he would slit her throat. G.P. believed him, so she unbuttoned and pulled down her pants, showing defendant her genitalia.

Defendant removed the knife from G.P.'s throat and told her to show him her "'tits.'" G.P. refused and pretended that she heard her son calling for her. G.P. then began walking to a nearby friend's house. Defendant began following G.P. but stopped

at an intersection. G.P. called 911 when she got to the house. A recording of the 911 call was played for the jury.

Banning police officers arrived and detained defendant. The officers conducted a patdown search of defendant and found two folding knives, one in defendant's front waist area, and the second in his right rear pocket. A detective also interviewed G.P. at the scene. She was crying. The detective observed a red mark on her neck. At trial, the detective opined the red mark on G.P.'s neck was consistent with her statement.

Defendant testified in his own defense. He acknowledged that he spoke to G.P. at the dumpster site while he was looking for recyclables and that he had two visible knives on his person for protection. Defendant, however, denied following G.P., brandishing the knives, threatening to slit G.P.'s throat, or grabbing G.P. He explained that he had asked G.P. at the dumpster area whether she was a man or woman because he could not tell, and that she told him she was a woman. While searching for recyclables, he also engaged G.P. in small talk, asking her for her name and how many children she had. G.P. stated that she had nine children, and when defendant questioned how, she voluntarily showed him her vagina.

III

DISCUSSION

Defendant argues the prosecutor committed misconduct by attempting to elicit inadmissible testimony from Banning Police Detective Derek Thesier regarding whether he believed G.P. was being honest. The People respond that defendant forfeited the

claim by not objecting on this ground in the trial court. In the alternative, the People assert that because the prosecutor did not intentionally elicit inadmissible evidence, she did not commit prosecutorial error. The People further contend that the isolated instance of alleged improper conduct did not constitute a pattern of conduct rendering the trial fundamentally unfair in denial of defendant's federal due process rights, and thus, even assuming error, such conduct was not prejudicial.

A. *Relevant Background*

On cross-examination, defense counsel questioned Detective Thesier about inconsistencies between G.P.'s initial statements in the police report, G.P.'s preliminary hearing testimony, and G.P.'s trial testimony. Defense counsel concluded cross-examination with the following colloquy with Detective Thesier:

"Q. Do you find that when people tell the truth that their statement generally is consistent?

"A. Yes. Sometimes they get things off chronological order, whatnot.

"Q. And you would agree that between the statement that you took on the date in question, the preliminary hearing two weeks later and today, which is quite a bit further out, that there's been a lot of inconsistent statements?

"A. I would say on, you know, which hands and whatnot, those types of things. Yes."

On redirect examination, the prosecutor had the following exchange with Detective Thesier:

"Q. Detective Thesier, based on your training and experience, have you dealt with victims of violent crimes before?

"A. Yes.

"Q. And you were present when [G.P.] spoke to you at the scene; right?

"A. Yes.

"Q. And you were present today when she testified; correct?

"A. Yes.

"Q. And as you sit here, based on your training and experience, do you believe that she's not being honest?

"A. No. I don't.

"[DEFENSE COUNSEL]: Objection—

"THE COURT: Sustained.

"Q. BY [THE PROSECUTOR]: Is it unusual for victims of violent crimes to sometimes get confused about the order in which things happen?

"A. No. It's not unusual.

"Q. And when she talked to you, she told you that the Defendant at one point said, 'Prove to me you're female or I'm going to slit your throat'; correct?

"A. Correct.

"Q. And then a little bit before that, her first thing was, 'Show me your pussy or I'm going to slit your throat'; correct?

"A. Correct.

"Q. Okay. So she was saying all of these things. It's just a little jumbled. Is that fair to say?

"A. Yes. It was. I kept having to reel her in on the interview because she was so upset so it was hard to get that chronological order down. I had to keep bringing her back. She was just very upset and she kept making, you know—giving the story.

"Q. Through all the time that she's testified and talked to you, she's been consistent that she saw a man on the street, he followed her to the dumpster, came up next to her, started talking to her, pulled out a knife, put it on her neck and threatened to slit her throat?

"A. All that is consistent.

"Q. And in the course of your job as a police officer, I imagine you had a chance to speak to lots of different types of people.

"A. Yes.

"Q. Is that true?

"A. Yes.

"Q. Okay. And some people are more educated than others; right?

"A. Yes.

"Q. Some people present better than others.

"A. Yes.

"Q. Okay. And some people are better communicators than others.

"A. Yes.

"Q. And when you speak to these victims of violent crimes, do they all act exactly the same, or do they act different?

"A. Everyone acts different. Everyone handles stress different.

"Q. And based on your interactions and observations of [G.P.], do you have any reason, based on your training and experience, to believe that she's not being honest?

"THE COURT: Counsel, I'm going to sustain on the Court's own objection.

"[THE PROSECUTOR]: Nothing further."

B. *Forfeiture*

Preliminarily, the People argue that defendant forfeited his prosecutorial misconduct claim by failing to object "on this ground, and he did not seek an admonition in the trial court." We disagree.

"'As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and [also] requested that the jury be admonished to disregard the impropriety.'" (*People v. Hill* (1998) 17 Cal.4th 800, 820-821 (*Hill*), overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13; see *People v. Cunningham* (2001) 25 Cal.4th 926, 1000.) If an objection has not been made, "'"the point is reviewable only if an admonition would not have cured the harm caused by the misconduct"'" (*Cunningham*, at pp. 1000-1001) or if an objection would have been futile (*Hill*, at pp. 820-821).

Here, as reflected above, after the detective responded, defense counsel objected to the question of whether the detective believed the victim was not being honest. And, the trial court sustained the objection. However, at no time did defense counsel cite the purportedly improper questions as misconduct. Just as significantly, at no time did he seek a curative instruction relating to the alleged misconduct. Although the trial court had sustained the second question on its own motion and did not give defense counsel an opportunity to object, defense counsel nonetheless could have sought a curative instruction. Accordingly, defendant may not claim that the prosecutor committed misconduct in this appeal. (*Hill, supra,* 17 Cal.4th at pp. 820-821.)

However, in order to avoid a future claim that defense counsel was incompetent for failing to cite the prosecutor's questions as misconduct and failing to seek a curative admonition, we discuss the merits of defendant's misconduct claim.

C. *Prosecutorial Misconduct*

"'"'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."'" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves "'"'the use of deceptive or reprehensible methods to attempt to persuade either the court or jury."'" [Citation.]' [Citation.]" (*Hill, supra,* 17 Cal.4th at p. 819.) The defendant need not show that the prosecutor acted in bad faith. (*Id.* at p. 822.)

"It is misconduct for a prosecutor to express a personal belief in the merits of a case, rather than a belief based upon the evidence at trial. [Citations.]" (*People v. Johnson* (1981) 121 Cal.App.3d 94, 102.) Similarly, "[t]he prosecutor is generally precluded from vouching for the credibility of her witnesses, or referring to evidence outside the record to bolster their credibility or attack that of the defendant. [Citations.]" (*People v. Anderson* (1990) 52 Cal.3d 453, 479.) In addition, it is "misconduct for a prosecutor to 'intentionally elicit inadmissible testimony.' [Citations.]" (*People v. Bonin* (1988) 46 Cal.3d 659, 689, overruled on other grounds in *Hill*, *supra*, 17 Cal.4th at p. 823, fn. 1; see *People v. Bell* (1989) 49 Cal.3d 502, 532 ["deliberate attempt to put inadmissible and prejudicial evidence before the jury" was misconduct].) However, when the prosecutor relies on the evidence presented at trial and the inferences to be drawn from this evidence, and does not imply any personal knowledge or belief based on facts outside the record, the prosecutor has not engaged in improper "'vouching.'" (*People v. Medina* (1995) 11 Cal.4th 694, 757 (*Medina*); see *People v. Frye* (1998) 18 Cal.4th 894, 971, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 [prosecutor's comments not improper vouching if assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the facts and reasonable inferences, not purported personal knowledge or belief].)

This court in *People v. Zambrano* (2004) 124 Cal.App.4th 228 (*Zambrano*) noted that courts have reached varying conclusions as to whether it is misconduct for a prosecutor to ask a defendant on cross-examination whether another witness was lying.

(*Id*. at p. 238.) One line of cases held that the question is always misconduct because it infringes on the jury's right to make credibility determinations or because the question is misleading in suggesting the only explanation for a discrepancy between the defendant's testimony and another witness's testimony is that one of them is lying. (*Id*. at pp. 238-239.) Another line of cases held that the question is not misconduct because it merely emphasizes the conflict in the evidence, which it is the jury's duty to resolve. (*Id*. at p. 239.) A third line of cases held that the question is neither categorically improper nor categorically proper, but is proper under certain limited circumstances, e.g., when the only possible explanation is that one or the other is lying, or when the defendant has opened the door during direct examination by testifying about the veracity of other witnesses, or when the question has a probative value in clarifying a particular line of testimony. (*Ibid*.) Under the third line of cases, "it is useful to distinguish between the admissibility of the evidence that 'were they lying' questions seek to elicit, and the broader question of whether and, if so, under what circumstances asking such questions constitutes prosecutorial misconduct." (*Ibid*.)

This court in *Zambrano* adopted the third approach and concluded the prosecutor's "'were they lying'" questions in that case elicited inadmissible evidence. (*Zambrano, supra*, 124 Cal.App.4th at pp. 239-241.) The questions were not relevant to any issue in the case. They did not clarify the defendant's testimony, because he had already testified that his recollection differed from the officers' in every material respect. (*Id*. at p. 240.) Nor did the questions inquire into any facts or circumstances surrounding the defendant's

testimony or develop independent evidence which ran contrary to his testimony. The questions served no purpose other than to elicit the defendant's inadmissible lay opinion concerning the officers' veracity. The questions merely forced him to opine, without foundation, that the officers were liars. (*Id.* at p. 241.)

In *Zambrano*, we next considered whether the questions constituted prosecutorial misconduct. (*Zambrano, supra*, 124 Cal.App.4th at p. 241.) A prosecutor has a duty to refrain from improper methods calculated to produce a wrongful conviction. (*Ibid.*) """"""A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'""""""" (*Ibid.*) Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade the jury. (*Ibid.*) We noted that even if a "were they lying" question calls for an inadmissible opinion on another person's veracity, asking one or two such questions, if necessary to clarify a witness's testimony, is not necessarily a reprehensible method of jury persuasion. (*Id.* at p. 242.)

We concluded that there was prosecutorial misconduct in that case, because the jury must have understood that the defendant was categorically denying the officers' version of the events surrounding the drug transaction, and the jury would have to decide who was telling the truth. Yet, the prosecutor "repeatedly and painstakingly asked defendant whether the officers were 'lying' about every aspect of their testimony that

differed from defendant's testimony. She used the questions to berate defendant before the jury and to force him to call the officers liars in an attempt to inflame the passions of the jury. This was misconduct. [¶] The misconduct was exacerbated when the prosecutor called [an officer] in rebuttal to testify that he was not lying and would not risk losing his job by lying." (*Zambrano, supra,* 124 Cal.App.4th at p. 242.) Nonetheless, finding the prosecutor's misconduct did not violate the defendant's right to due process, we applied the state standard for prejudicial misconduct and concluded it was not reasonably probable the defendant would have obtained a more favorable result had the misconduct not occurred. (*Id*. at p. 243.)

The approach adopted by *Zambrano* as to "'were they lying'" cross-examination questions was later endorsed by our Supreme Court in *People v. Chatman* (2006) 38 Cal.4th 344, 384 (*Chatman*). *Chatman* demonstrates that trial courts should carefully scrutinize "'were they lying'" questions in context. (*Ibid*.) Such questions "should not be permitted when argumentative, or when designed to elicit testimony that is irrelevant or speculative. However, in its discretion, a court may permit such questions if the witness to whom they are addressed has personal knowledge that allows him to provide competent testimony that may legitimately assist the trier of fact in resolving credibility questions." (*Id*. at p. 384.) For example, "[a] defendant who is a percipient witness to the events at issue has personal knowledge whether other witnesses who describe those events are testifying truthfully and accurately. As a result, he might also be able to provide insight on whether witnesses whose testimony differs from his own are

intentionally lying or are merely mistaken." (*Id*. at p. 382.) Likewise, "[w]hen . . . the defendant knows the other witnesses well, he might know of reasons those witnesses might lie." (*Ibid*.) Additionally, it is permissible for the prosecutor to clarify the defendant's position. And it is also permissible "to ask whether [the defendant] knew of facts that would show a witness's testimony might be inaccurate or mistaken." (*Id*. at p. 383.)

Defendant contends that it was improper for the prosecutor to ask Detective Thesier whether he believed the victim was not being honest. Defendant primarily relies on *People v. Sergill* (1982) 138 Cal.App.3d 34, 38-41 (*Sergill*), and cites to *People v. Melton* (1988) 44 Cal.3d 713, 743-745 (*Melton*), in support of his claim that questions about whether other witnesses were lying or telling the truth are improper and prejudicial. The People do not address *Sergill* or *Melton*, but instead rely on *Chatman*, *supra*, 38 Cal.4th 344.

In *Sergill*, *supra*, 138 Cal.App.3d 34, reversible error was found because the trial court allowed two investigating police officers to testify at trial about opinions they formed as to whether the eight-year-old child victim was being truthful about the allegations when they interviewed her. (*Id*. at pp. 37-38.) During trial, the defendant testified in his own defense and denied the allegations. (*Id*. at p. 37.) Defense counsel called the investigating officers to testify about discrepancies between the child's sexual abuse report to police and her trial testimony. (*Id*. at p. 38.) On cross-examination, the prosecutor asked the investigating officers whether they had formed opinions as to

whether the child's allegations were true. (*Ibid*.) In overruling defendant's objection, the trial court stated as follows: "'Number one, a witness is entitled to give his opinion on the questions that the jury is entitled to determine. Number two, this officer has had approximately seven years of experience, and has written, as I recall his testimony, something in the nature of a thousand or more reports, which indicates that he has had experience in taking witnesses' testimony, and I think [in] the course of that he would be normally expected to judge whether a person, in his opinion, is telling the truth or not. I think that he's qualified to render his opinion in that regard.'" (*Ibid*.) Thereafter, both officers testified they were convinced the child was being truthful and explained the reasons for their beliefs. One officer stated he had interviewed many children, and, as a result, could usually determine with a high degree of certainty whether their allegations were true. (*Ibid*.)

In reaching its conclusion there was reversible error as a result of the testimony, the appellate court in *Sergill* opined the officers' opinions were inadmissible for several reasons. First, the testimony did not qualify as reputation evidence, because the officers did not know the child, and therefore, could not testify as to her reputation for being truthful. (*Sergill, supra,* 138 Cal.App.3d at p. 39.) Second, the officers' experience interviewing reporters of crimes numerous times during their careers did not qualify them as experts in judging truthfulness, and in any case, the veracity of those who report crimes is not a proper subject for expert testimony. (*Ibid*.) Third, the testimony was not admissible as lay opinion under Evidence Code section 800, subdivision (b). (*Sergill*, at

p. 40.) "A lay witness may testify in the form of an opinion only when he cannot adequately describe his observations without using opinion wording," such as when the details of an observation are too complex or subtle for concrete description. (*Ibid*.) The officers, however, were able to testify about their interviews with the child victim in concrete detail. Finally, the officers' opinions about the victim's veracity were not relevant because they did not fall within the list of factors bearing on credibility listed in Evidence Code section 780. (*Sergill*, at p. 40.) Finding error, the appellate court in *Sergill* considered "whether it is reasonably probable that a result more favorable to appellant would have been reached had this evidence not been admitted. (*People v. Watson* (1956) 46 Cal.2d 818, 836 [*Watson*].)" (*Sergill*, at p. 41.) The appellate court concluded the error in allowing the testimony was prejudicial under *Watson* because the child victim's credibility was the "critical question," and there were other doubts about the evidence as a whole. (*Sergill*, at p. 41.)

In *Melton*, *supra*, 44 Cal.3d 713, the trial court permitted the prosecutor to elicit testimony from a defense investigator that the investigator did not believe a witness's claims. (*Id*. at pp. 743-744.) The Supreme Court found the trial court erred. Citing *Sergill*, the Supreme Court stated "[l]ay opinion about the veracity of particular statements by another is inadmissible on that issue" because "the fact finder, not the witnesses, must draw the ultimate inferences from the evidence." (*Melton*, at p. 744.) The *Melton* court noted that the investigator was neither a credibility expert nor knew the

witness's reputation for veracity, and therefore, the court "erred insofar as it admitted [his] testimony to indicate his assessment of [the witness's] credibility." (*Id*. at p. 745.)

Here, Detective Thesier had no personal knowledge of the events that transpired between defendant and the victim. Detective Thesier also had no personal knowledge as to the victim's reputation for being truthful. In any event, the testimony was relevant to rebut the defense theory that the victim was lying based on the inconsistencies between her initial report and her subsequent testimony. The prosecutor attempted to elicit testimony from Detective Thesier to establish that even though the victim had inconsistencies in her recollection of the events that morning, this did not mean she was lying. Although the two questions framed by the prosecutor, and asked of the detective, were similar to the questions posed to the officers in *Sergill*, a thorough examination of the record shows that the prosecutor's questions were an attempt to establish that it was normal for victims in these types of cases to be confused on the precise details of the incident.

Nonetheless, the prosecutor committed misconduct in asking the detective a *second* time, after the same question had been sustained, about whether he believed the victim was not being honest. The People assert that the prosecutor in asking the question a second time "showed that she did not believe the testimony she was eliciting was inadmissible." The People also contend that there was no evidence the prosecutor intentionally questioned the detective regarding inadmissible evidence. The People's attempt to justify the prosecutor's similar question a second time is particularly

disingenuous in light of the fact the trial court had sustained the same question about 11 questions earlier. For this same reason, we find the prosecutor acted intentionally in asking the detective a *second* time whether he believed the victim was not being truthful.

We next consider whether the error was harmless. First, the misconduct did not amount to "deceptive or reprehensible methods to attempt to persuade either the trial court or the jury." (*People v. Morales* (2001) 25 Cal.4th 34, 44.) In other words, here defendant's right to due process under the federal Constitution was not violated by the prosecutor's misconduct in asking the detective whether he believed the victim was not being honest. As such, like in *Zambrano*, we conclude the state standard for prejudicial misconduct applies in this case. (*Zambrano, supra*, 124 Cal.App.4th at p. 243.)

Applying this standard, we find it is not reasonably probable defendant would have obtained a more favorable result had the misconduct not occurred. The misconduct was relatively benign in terms of its likely impact on the jury's verdict. (See, e.g., *Medina, supra*, 11 Cal.4th at pp. 757, 759-761 [prosecutor's improper vouching for witnesses and his appeal to passions of the jury were misconduct but were not prejudicial because none of the misconduct was serious enough, even in the aggregate, to prejudice the defendant]; *Zambrano, supra,* 124 Cal.App.4th at p. 243 [prosecutor's repeated "were they lying" questions were misconduct but were not prejudicial because defendant destroyed his own credibility with patently unreasonable testimony].) In addition, the trial court instructed the jury, "Nothing that the attorneys say is evidence" (CALCRIM No. 222), and it was the duty of the jury to determine the facts based on all the evidence

(CALCRIM No. 200). The jury was also instructed on how to evaluate the credibility or believability of witnesses (CALCRIM No. 226), and how to evaluate conflicting evidence (CALCRIM No. 302). The jury is presumed to follow the court's instruction. (See *People v. Kipp* (2001) 26 Cal.4th 1100, 1130; *People v. Hughey* (1987) 194 Cal.App.3d 1383, 1396 [any potential prejudice was dissipated by the jury instruction that statements made by the attorney were not evidence].)

Furthermore, there was ample evidence that defendant held a knife to the victim's throat and threatened to slit her throat. Although the victim may have been confused on the exact order the events occurred, or regarding minor details as pointed out by Detective Thesier, she was consistent in her account that defendant had placed a knife to her throat and threatened to slit it. The victim also testified that she was being honest and was not lying about what had occurred. Moreover, the victim's 911 call collaborated her account of what defendant had done and demonstrated the fear she was in at that moment. The jury could reasonably conclude that the victim's initial statement to the dispatcher that defendant had held a knife to her neck was truthful. Based on what the victim had reported to the 911 dispatcher, the responding police officer located and detained defendant, and found two knives on his person. Detective Thesier, who interviewed the victim, explained to the jury how upset and scared the victim was by defendant's actions. Detective Thesier also observed a red mark on the victim's neck that was consistent with a knife being held to her neck.

We acknowledge, as defendant points out, that the trial hinged on the credibility of the victim and defendant, that the victim had provided inconsistent statements, and that the jury had initially deadlocked as to both counts. However, given the jury instructions, the strength of the evidence demonstrating defendant held a knife to the victim's throat and threatened to slit her throat, and the corroborating evidence through the 911 call and knives found on defendant's person, it is not reasonably probable that defendant would have obtained a more favorable result but for the prosecutor's improper question to Detective Thesier on redirect examination. (*Watson, supra*, 46 Cal.2d at p. 836.)

D. *Senate Bill No. 1393*

While defendant's appeal was pending in this court, he made a request to file a supplemental brief, which this court granted. The People in response also filed a supplemental brief. In his supplemental brief, defendant asserts that the matter should be remanded to allow the trial court to exercise its discretion to strike or to impose his formerly mandatory five-year section 667, subdivision (a) sentence enhancement. He also claims Senate Bill No. 1393 applies retroactively provided the judgment of conviction is not final when Senate Bill No. 1393 became effective on January 1, 2019. The People agree defendant is entitled to a remand and that Senate Bill No. 1393 applies retroactively.

The Governor signed Senate Bill No. 1393 on September 30, 2018, amending sections 667, subdivision (a), and 1385, subdivision (b). (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971 (*Garcia*).) The amendments took effect on January 1, 2019, and allow the trial court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.) Under the prior versions of these statutes, "the court [was] required to impose a five-year consecutive term for 'any person convicted of a serious felony who previously ha[d] been convicted of a serious felony' [citation], and the court ha[d] no discretion 'to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667.'" (*Garcia*, at p. 971)

As we held in *Garcia*, the Legislature intended Senate Bill No. 1393 to apply retroactively to all cases not yet final on its effective date. (*Garcia*, *supra*, 28 Cal.App.5th at pp. 972-973.) Defendant's case was not final on January 1, 2019, the effective date of the amendments. We therefore remand for the court to exercise its newly granted discretion to strike or dismiss defendant's prior serious felony conviction for sentencing purposes. (*Id.* at p. 973.) We express no opinion as to how the court should exercise that discretion and conclude only that it is the trial court's prerogative to exercise that discretion in the first instance.

IV

DISPOSITION

The matter is remanded to the trial court with directions to resentence defendant pursuant to sections 667, subdivision (a), and 1385, subdivision (b), as amended by Senate Bill No. 1393, effective January 1, 2019. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

RAMIREZ
P. J.

FIELDS
J.